

1. Describe Nowheresville. How is this world different from our world?
2. Explain the doctrine of the logical correlativity of rights and duties. What is Feinberg's position on this doctrine?
3. How does Feinberg explain the concept of personal desert? How would personal desert work in Nowheresville?
4. Explain the notion of a sovereign right-monopoly. How would this work in Nowheresville according to Feinberg?

Taking Rights Seriously

On Dworkin's view, if a people have a right to do something, then it is wrong to interfere with them. For example, if citizens have a right to free speech, then it is wrong for the government to interfere with the exercise of this right (unless this is necessary to protect other rights). This notion of rights, Dworkin believes, rests on the Kantian idea of treating people with dignity as members of the moral community, and also on the idea of political equality.

The language of rights now dominates political debate in the United States. Does the Govern-

5. What are claim-rights? Why does Feinberg think they are morally important?

1. Does Feinberg make a convincing case for the importance of rights? Why or why not?
2. Can you give a noncircular definition of claim-right?

The debate does not include the issue of whether citizens have *some* moral rights against their Government. It seems accepted on all sides that they do. Conventional lawyers and politicians take it as a point of pride that our legal system recognizes, for example, individual rights of free speech, equality, and due process. They base their claim that our law deserves respect, at least in part, on that fact, for they would not claim that totalitarian systems deserve the same loyalty.

Some philosophers, of course, reject the idea that citizens have rights apart from what the law happens to give them. Bentham thought that the idea of moral rights was 'nonsense on stilts'. But that view has never been part of our orthodox political theory, and politicians of both parties appeal to the rights of the people to justify a great part of what they want to do. I shall not

All this is, says the Supreme Court, is to give the States by the compact a right to alter the Constitution in order to protect their rights in the federal system. In the process, equal protection is not in order present legislation. The power to alter the state legislature is not state legislative power. The state legislature offends the some commercial rights and moral rights and that is hardly

The Constitution by making the answer to the problem of the inherent and important civil disobedience a prominent question the Constitution recognizes all this and it does not pose, citizens even if it did

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be concerned, in this essay, to defend the thesis that citizens have moral rights against their governments; I want instead to explore the implications of that thesis for those, including the present United States Government, who profess to accept it.

It is much in dispute, of course, what *particular* rights citizens have. Does the acknowledged right to free speech, for example, include the right to participate in nuisance demonstrations? In practice the Government will have the last word on what an individual's rights are, because its police will do what its officials and courts say. But that does not mean that the Government's view is necessarily the correct view; anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.

All this is sometimes obscured in the United States by the constitutional system. The American Constitution provides a set of individual *legal* rights in the First Amendment, and in the due process, equal protection, and similar clauses. Under present legal practice the Supreme Court has the power to declare an act of Congress or of a state legislature void if the Court finds that the act offends these provisions. This practice has led some commentators to suppose that individual moral rights are fully protected by this system, but that is hardly so, nor could it be so.

The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men. This fusion has important consequences for the debates about civil disobedience. . . . But it leaves open two prominent questions. It does not tell us whether the Constitution, even properly interpreted, recognizes all the moral rights that citizens have, and it does not tell us whether, as many suppose, citizens would have a duty to obey the law even if it did invade their moral rights. . . .

Even if the Constitution were perfect, of course, and the majority left it alone, it would not follow that the Supreme Court could guarantee the individual rights of citizens. A Supreme Court decision is still a legal decision, and it must take into account precedent and in-

stitutional considerations like relations between the Court and Congress, as well as morality. And no judicial decision is necessarily the right decision. Judges stand for different positions on controversial issues of law and morals and, as the fights over Nixon's Supreme Court nominations showed, a President is entitled to appoint judges of his own persuasion, provided that they are honest and capable.

So, though the constitutional system adds something to the protection of moral rights against the Government, it falls far short of guaranteeing these rights, or even establishing what they are. . . .

RIGHTS AND THE RIGHT TO BREAK THE LAW

. . . In most cases when we say that someone has 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference. I use this strong sense of right when I say that you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worthwhile way. I mean that it would be wrong for anyone to interfere with you even though you propose to spend your money in a way that I think is wrong.

There is a clear difference between saying that someone has a right to do something in this sense and saying that it is the 'right' thing for him to do, or that he does no 'wrong' in doing it. Someone may have the right to do something that is the wrong thing for him to do, as might be the case with gambling. Conversely, something may be the right thing for him to do and yet he may have no right to do it, in the sense that it would not be wrong for someone to interfere with his trying. If our army captures an enemy soldier, we might say that the right thing for him to do is to try to escape, but it would not follow that it is wrong for us to try to stop him. . . .

These distinctions enable us to see an ambiguity in the orthodox question: Does a man ever have a right to break the law? Does that question mean to ask whether he ever has a right to break



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the law in the strong sense, so that the Government would do wrong to stop him, by arresting and prosecuting him? Or does it mean to ask whether he ever does the right thing to break the law, so that we should all respect him even though the Government should jail him? . . .

Conservatives and liberals do agree that sometimes a man does not do the wrong thing to break a law, when his conscience so requires. They disagree, when they do, over the different issue of what the State's response should be. Both parties do think that sometimes the State should prosecute. But this is not inconsistent with the proposition that the man prosecuted did the right thing in breaking the law. . . .

I said that in the United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution. If this idea is significant, and worth bragging about, then these rights must be rights in the strong sense I just described. The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so.

This is a crucial point, and I want to labour it. Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility—that it is calculated to produce more over-all benefit than harm. So, though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification if the proper officials believe, on sound evidence, that the gain to the many will outweigh the inconvenience to the few. When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not

enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim.

Not all legal rights, or even Constitutional rights, represent moral rights against the Government. I now have the legal right to drive either way on Fifty-seventh Street, but the Government would do no wrong to make that street one-way if it thought it in the general interest to do so. I have a Constitutional right to vote for a congressman every two years, but the national and state governments would do no wrong if, following the amendment procedure, they made a congressman's term four years instead of two, again on the basis of a judgment that this would be for the general good.

But those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen. If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed.

I must not overstate the point. Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit (though if he acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental). What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be

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using some sense of 'right' other than the strong sense necessary to give his claim the political importance it is normally taken to have. . . .

I said that any society that claims to recognize rights at all must abandon the notion of a general duty to obey the law that holds in all cases. This is important, because it shows that there are no short cuts to meeting a citizen's claim to right. If a citizen argues that he has a moral right not to serve in the Army, or to protest in a way he finds effective, then an official who wants to answer him, and not simply bludgeon him into obedience, must respond to the particular point he makes, and cannot point to the draft law or a Supreme Court decision as having even special, let alone decisive, weight. Sometimes an official who considers the citizen's moral arguments in good faith will be persuaded that the citizen's claim is plausible, or even right. It does not follow, however, that he will always be persuaded or that he always should be.

I must emphasize that all these propositions concern the strong sense of right, and they therefore leave open important questions about the right thing to do. If a man believes he has the right to break the law, he must then ask whether he does the right thing to exercise that right. He must remember that reasonable men can differ about whether he has a right against the Government, and therefore the right to break the law, that he thinks he has; and therefore that reasonable men can oppose him in good faith. He must take into account the various consequences his acts will have, whether they involve violence, and such other considerations as the context makes relevant; he must not go beyond the rights he can in good faith claim, to acts that violate the rights of others. . . .

CONTROVERSIAL RIGHTS

The argument so far has been hypothetical: if a man has a particular moral right against the Government, that right survives contrary legislation or adjudication. But this does not tell us what rights he has, and it is notorious that reasonable men disagree about that. There is wide agreement on certain clearcut cases; almost ev-

eryone who believes in rights at all would admit, for example, that a man has a moral right to speak his mind in a non-provocative way on matters of political concern, and that this is an important right that the State must go to great pains to protect. But there is great controversy as to the limits of such paradigm rights; and the so-called 'anti-riot' law involved in the famous Chicago Seven trial of the last decade is a case in point.

The defendants were accused of conspiring to cross state lines with the intention of causing a riot. This charge is vague—perhaps unconstitutionally vague—but the law apparently defines as criminal emotional speeches which argue that violence is justified in order to secure political equality. Does the right of free speech protect this sort of speech? That, of course, is a legal issue, because it invokes the free-speech clause of the First Amendment of the Constitution. But it is also a moral issue, because, as I said, we must treat the First Amendment as an attempt to protect a moral right. It is part of the job of governing to 'define' moral rights through statutes and judicial decisions, that is, to declare officially the extent that moral rights will be taken to have in law. Congress faced this task in voting on the anti-riot bill, and the Supreme Court has faced it in countless cases. How should the different departments of government go about defining moral rights?

They should begin with a sense that whatever they decide might be wrong. History and their descendants may judge that they acted unjustly when they thought they were right. If they take their duty seriously, they must try to limit their mistakes, and they must therefore try to discover where the dangers of mistake lie.

They might choose one of two very different models for this purpose. The first model recommends striking a balance between the rights of the individual and the demands of society at large. If the Government *infringes* on a moral right (for example, by defining the right of free speech more narrowly than justice requires), then it has done the individual a wrong. On the other hand, if the Government *inflates* a right (by defining it more broadly than justice requires) then it cheats society of some general

benefit, like safe streets, that there is no reason it should not have. So a mistake on one side is as serious as a mistake on the other. The course of government is to steer to the middle, to balance the general good and personal rights, giving to each its due. . . .

The first model, described in this way, has great plausibility, and most laymen and lawyers, I think, would respond to it warmly. The metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric, and this metaphor gives the model both familiarity and appeal. Nevertheless, the first model is a false one, certainly in the case of rights generally regarded as important, and the metaphor is the heart of its error.

The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.¹

It makes sense to say that a man has a fundamental right against the Government, in the

strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is as serious as invading them. If the Government errs on the side of the individual, then it simply pays a little more in social efficiency than it has to pay; it pays a little more, that is, of the same coin that it has already decided must be spent. But if it errs against the individual it inflicts an insult upon him that, on its own reckoning, it is worth a great deal of that coin to avoid. . . .

It cannot be an argument for curtailing a right, once granted, simply that society would pay a further price for extending it. There must be something special about that further cost, or there must be some other feature of the case, that makes it sensible to say that although great social cost is warranted to protect the original right, this particular cost is not necessary. Otherwise, the Government's failure to extend the right will show that its recognition of the right in the original case is a sham, a promise that it intends to keep only until that becomes inconvenient.

How can we show that a particular cost is not worth paying without taking back the initial recognition of a right? I can think of only three sorts of grounds that can consistently be used to limit the definition of a particular right. First, the Government might show that the values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right, in the strong sense I described earlier, would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be of a

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degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved. . . .

But what of the individual rights of those who will be destroyed by a riot, of the passerby who will be killed by a sniper's bullet or the shopkeeper who will be ruined by looting? To put the issue in this way, as a question of competing rights, suggests a principle that would undercut the effect of uncertainty. Shall we say that some rights to protection are so important that the Government is justified in doing all it can to maintain them? Shall we therefore say that the Government may abridge the rights of others to act when their acts might simply increase the risk, by however slight or speculative a margin, that some person's right to life or property will be violated?

Some such principle is relied on by those who oppose the Supreme Court's recent liberal rulings on police procedure. These rulings increase the chance that a guilty man will go free, and therefore marginally increase the risk that any particular member of the community will be murdered, raped, or robbed. Some critics believe that the Court's decisions must therefore be wrong.

But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle. If forcing a man to testify against himself, or forbidding him to speak, does the damage that the rights against self-incrimination and the right of free speech assume, then it would be contemptuous for the State to tell a man that he must suffer this damage against the possibility that other men's risk of loss may be marginally reduced. If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned.

Of course the Government may discriminate and may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person or property of others, and no other means of preventing this are at hand, as in the case of the man shouting 'Fire!' in a theater. But we must reject the suggested principle that the

Government can simply ignore rights to speak when life and property are in question. So long as the impact of speech on these other rights remains speculative and marginal, it must look elsewhere for levers to pull.

WHY TAKE RIGHTS SERIOUSLY?

I said at the beginning of this essay that I wanted to show what a government must do that professes to recognize individual rights. It must dispense with the claim that citizens never have a right to break its law, and it must not define citizens' rights so that these are cut off for supposed reasons of the general good. Any Government's harsh treatment of civil disobedience, or campaign against vocal protest, may therefore be thought to count against its sincerity.

One might well ask, however, whether it is wise to take rights all that seriously after all. America's genius, at least in her own legend, lies in not taking any abstract doctrine to its logical extreme. It may be time to ignore abstractions, and concentrate instead on giving the majority of our citizens a new sense of their Government's concern for their welfare, and of their title to rule.

That, in any event, is what former Vice-President Agnew seemed to believe. In a policy statement on the issue of 'weirdos' and social misfits, he said that the liberals' concern for individual rights was a headwind blowing in the face of the ship of state. That is a poor metaphor, but the philosophical point it expresses is very well taken. He recognized, as many liberals do not, that the majority cannot travel as fast or as far as it would like if it recognizes the rights of individuals to do what, in the majority's terms, is the wrong thing to do.

Spiro Agnew supposed that rights are divisive, and that national unity and a new respect for law may be developed by taking them more skeptically. But he is wrong. America will continue to be divided by its social and foreign policy, and if the economy grows weaker again the divisions will become more bitter. If we want our laws and our legal institutions to provide the ground rules within which these issues will be contested then these ground rules must not

Joel Feinberg

The Nature and Value of Rights

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Feinberg wants to demonstrate that rights are morally important. To do this, he imagines Nowheresville, a world like our own except that people do not have rights. As a result, people in this world cannot make moral claims when they are treated unjustly. They cannot demand or claim just treatment, and so they are deprived of self-respect and human dignity.

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I would like to begin by conducting a thought experiment. Try to imagine Nowheresville—a world very much like our own except that no one, or hardly any one (the qualification is not important), has rights. If this flaw makes Nowheresville too ugly to hold very long in contemplation, we can make it as pretty as we wish in other moral respects. We can, for example, make the human beings in it as attractive and virtuous as possible without taxing our conceptions of the limits of human nature. In particular, let the virtues of moral sensibility flourish. Fill this imagined world with as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain. Now we can imagine men helping one another from compassionate motives merely, quite as much or

even more than they do in our actual world from a variety of more complicated motives.

This picture, pleasant as it is in some respects, would hardly have satisfied Immanuel Kant. Benevolently motivated actions do good, Kant admitted, and therefore are better, *ceteris paribus*, than malevolently motivated actions; but no action can have supreme kind of worth—what Kant called “moral worth”—unless its whole motivating power derives from the thought that it is *required by duty*. Accordingly, let us try to make Nowheresville more appealing to Kant by introducing the idea of duty into it, and letting the sense of duty be a sufficient motive for many beneficent and honorable actions. But doesn't this bring our original thought experiment to an abortive conclusion? If duties are permitted entry into Nowheresville, are not rights necessarily smuggled in along with them?

The question is well-asked, and requires here a brief digression so that we might consider the so-called “doctrine of the logical correlativity of rights and duties.” This is the doctrine that (i) all duties entail other people's rights and (ii) all rights entail other people's duties. Only the first part of the doctrine, the alleged entailment from duties to rights, need concern us here. Is this part of the doctrine correct? It should not be surprising that my answer is: “In a sense yes and in a sense no.” Etymologically, the word “duty” is associated with actions that are *due* someone else, the payments of debts to creditors, the keeping of agreements with promises, the payment of club dues, or legal fees, or tariff levies to appropriate authorities or their representatives. In this original sense of “duty,” all duties are correlated with the rights of those to whom the duty is owed. On the other hand, there seem to be numerous classes of duties, both of a legal and non-legal kind, that are *not* logically correlated with the rights of other persons. This seems to be a consequence of the fact that the word “duty” has come to be used for *any* action understood to be *required*, whether by the rights of others, or by law, or by higher authority, or by conscience, or whatever. When the notion of requirement is in clear focus it is likely to seem

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the only element in the idea of duty that is essential, and the other component notion—that a duty is something *due* someone else—drops off. Thus, in this widespread but derivative usage, “duty” tends to be used for any action we feel we *must* (for whatever reason) do. It comes, in short, to be a term of moral modality merely; and it is no wonder that the first thesis of the logical correlativity doctrine often fails.

Let us then introduce duties into Nowheresville, but only in the sense of actions that are, or believed to be, morally mandatory, but not in the older sense of actions that are due others and can be claimed by others as their right. Nowheresville now can have duties of the sort imposed by positive law. A legal duty is not something we are implored or advised to do merely; it is something the law, or an authority under the law, *requires* us to do whether we want to or not, under pain of penalty. When traffic lights turn red, however, there is no determinate person who can plausibly be said to claim our stopping as his due, so that the motorist owes it to *him* to stop, in the way a debtor owes it to his creditor to pay. In our own actual world, of course, we sometimes owe it to our fellow motorists to stop; but that kind of right-correlated duty does not exist in Nowheresville. There, motorists “owe” obedience to the Law, but they owe nothing to one another. When they collide, no matter who is at fault, no one is accountable to anyone else, and no one has any sound grievance or “right to complain.”

When we leave legal contexts to consider moral obligations and other extra-legal duties, a greater variety of duties-without-correlativerights present themselves. Duties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due. Charitable contributions are more like gratuitous services, favours, and gifts than like repayments of debts or reparations; and yet we do have duties to be charitable. Many persons, moreover, in our actual world believe that they are required by their own consciences to do more than that “duty” that *can* be demanded of them by their prospective beneficiaries. I have quoted elsewhere the citation from H. B. Acton of a character in a Malraux novel who “gave all

his supply of poison to his fellow prisoners to enable them by suicide to escape the burning alive which was to be their fate and his.” This man, Acton adds, “probably did not think that [the others] had more of a right to the poison than he had, though he thought it his duty to give it to them.”¹ I am sure that there are many actual examples, less dramatically heroic than this fictitious one, of persons who believe, rightly or wrongly, that they *must do* something (hence the word “duty”) for another person in excess of what that person can appropriately demand of him (hence the absence of “right”).

Now the digression is over and we can return to Nowheresville and summarize what we have put in it thus far. We now find spontaneous benevolence in somewhat larger degree than in our actual world, and also the acknowledged existence of duties of obedience, duties of charity, and duties imposed by exacting private consciences; and also, let us suppose, a degree of conscientiousness in respect to those duties somewhat in excess of what is to be found in our actual world. I doubt that Kant would be fully satisfied with Nowheresville even now that duty and respect for law and authority have been added to it; but I feel certain that he would regard their addition at least as an improvement. I will now introduce two further moral practices into Nowheresville that will make the world very little more appealing to Kant, but will make it appear more familiar to us. These are the practices connected with the notions of *personal desert* and what I call a *sovereign monopoly of rights*.

When a person is said to deserve something good from us what is meant in parts is that there would be a certain propriety in our giving that good thing to him in virtue of the kind of person he is, perhaps, or more likely, in virtue of some specific thing he has done. The propriety involved here is a much weaker kind than that which derives from our having promised him the good thing or from his having qualified for it by satisfying the well-advertised conditions of some public rule. In the latter case he could be said not merely to deserve the good thing but also to have a *right* to it, that is to be in a position to demand it as his due; and of course we will not have that sort of thing in Nowheres-

ville. That would be mere desert between one person and another party's between human nature and appearance and appearance.

The following idea of desert for others: A man's right to reward service; still there would be gratuitous reward for good service for bad service and proper waiting response should be given not been given complaint, since posed to have claiming it a

The idea of from its beginning seems clearly tin said “new day servants their agreed If their contractual right make legal claim If they do let their employment them proposed fee. This is a does a splenimal contractual further obligation agreed upon additional service done entirely sensitive exceptional freely on his service, with mand it as I with gratitude

In our age there is now exchange c

ville. That weaker kind of propriety which is mere desert is simply a kind of *fittingness* between one party's character or action and another party's favorable response, much like that between humor and laughter, or good performance and applause.

The following seems to be the origin of the idea of deserving good or bad treatment from others: A master or lord was under no obligation to reward his servant for especially good service; still a master might naturally feel that there would be a special fittingness in giving a gratuitous reward as a grateful response to the good service (or conversely imposing a penalty for bad service). Such an act while surely fitting and proper was entirely *supererogatory*. The fitting response in turn from the rewarded servant should be gratitude. If the deserved reward had not been given him he should have had no complaint, since he only *deserved* the reward, as opposed to having a *right* to it, or a ground for claiming it as his due.

The idea of desert has evolved a good bit away from its beginnings by now, but nevertheless, it seems clearly to be one of those words J. L. Austin said "never entirely forget their pasts."² Today servants qualify for their wages by doing their agreed upon chores, no more and no less. If their wages are not forthcoming, their contractual rights have been violated and they can make legal claim to the money that is their due. If they do less than they agreed to do, however, their employers may "dock" them, by paying them proportionately less than the agreed upon fee. This is all a matter of right. But if the servant does a splendid job, above and beyond his minimal contractual duties, the employer is under no further obligation to reward him, for this was not agreed upon, even tacitly, in advance. The additional service was all the servant's idea and done entirely on his own. Nevertheless, the morally sensitive employer may feel that it would be exceptionally appropriate for him to respond, freely on his own, to the servant's meritorious service, with a reward. The employee cannot demand it as his due, but he will happily accept it, with gratitude, as a fitting response to his desert.

In our age of organized labor, even this picture is now archaic; for almost every kind of exchange of service is governed by hard bar-

gained contracts so that even bonuses can sometimes be demanded as a matter of right, and nothing is given for nothing on either side of the bargaining table. And perhaps that is a good thing; for consider an anachronistic instance of the earlier kind of practice that survives, at least as a matter of form, in the quaint old practice of "tipping." The tip was originally conceived as a reward that has to be earned by "zealous service." It is not something to be taken for granted as a standard response to *any* service. That is to say that its payment is a "*gratuity*," not a discharge of obligation, but something given apart from, or in addition to, anything the recipient can expect as a matter of right. That is what tipping originally meant at any rate, and tips are still referred to as "gratuities" in the tax forms. But try to explain all that to a New York cab driver! If he has *earned* his gratuity, by God, he has it coming, and there had better be sufficient acknowledgement of his desert or he'll give you a piece of his mind! I'm not generally prone to defend New York cab drivers, but they do have a point here. There is the making of a paradox in the queerly unstable concept of an "earned gratuity." One can understand how "desert" in the weak sense of "propriety" or "mere fittingness" tends to generate a stronger sense in which desert is itself the ground for a claim of right.

In Nowheresville, nevertheless, we will have only the original weak kind of desert. Indeed, it will be impossible to keep this idea out if we allow such practices as teachers grading students, judges awarding prizes, and servants serving benevolent but class-conscious masters. Nowheresville is a reasonably good world in many ways, and its teachers, judges, and masters will generally try to give students, contestants, and servants the grades, prizes, and rewards they deserve. For this the recipients will be grateful; but they will never think to complain, or even feel aggrieved, when expected responses to desert fail. The masters, judges, and teachers don't *have* to do good things, after all, for *anyone*. One should be happy that they *ever* treat us well, and not grumble over their occasional lapses. Their hoped for responses, after all, are *gratuities*, and there is no wrong in the omission of what is merely gratuitous. Such

is the response of persons who have no concept of rights, even persons who are proud of their own deserts.³

Surely, one might ask, rights have to come in somewhere, if we are to have even moderately complex forms of social organization. Without rules that confer rights and impose obligations, how can we have ownership of property, bargains and deals, promises and contracts, appointments and loans, marriages and partnerships? Very well, let us introduce all of these social and economic practices into Nowheresville, but with *one big twist*. With them I should like to introduce the curious notion of a "sovereign right-monopoly." You will recall that the subjects in Hobbes's *Leviathan* had no rights whatever against their sovereign. He could do as he liked with them, even gratuitously harm them, but this gave them no valid grievance against him. The sovereign, to be sure, had a certain duty to treat his subjects well, but this duty was owed not to the subjects directly, but to God, just as we might have a duty to a person to treat his property well, but of course no duty to the property itself but only to its owner. Thus, while the sovereign was quite capable of *harming* his subjects, he could commit no wrong against them that they could complain about, since they had no prior claims against his conduct. The only party *wronged* by the sovereign's mistreatment of his subjects was God, the supreme lawmaker. Thus, in repenting cruelty to his subjects, the sovereign might say to God, as David did after killing Uriah, "to Thee only have I sinned."⁴

Even in the *Leviathan*, however, ordinary people had ordinary rights *against one another*. They played roles, occupied offices, made agreements, and signed contracts. In a genuine "sovereign right-monopoly," as I shall be using that phrase, they will do all those things too, and thus incur genuine obligations toward one another; but the obligations (here is the twist) will not be owed directly to promisees, creditors, parents, and the like, but rather to God alone, or to the members of some elite, or to a single sovereign under God. Hence, the rights correlative to the obligations that derive from these transactions are all owned by some "outside" authority.

As far as I know, no philosopher has ever suggested that even our role and contract obligations

(in this, our actual world) are all owed directly to a divine intermediary, but some theologians have approached such extreme moral occasionalism. I have in mind the familiar phrase in certain widely distributed religious tracts that "it takes three to marry," which suggests that marital vows are not made between bride and groom directly but between each spouse and God, so that if one breaks his vow, the other cannot rightly complain of being wronged, since only God could have claimed performance of the marital duties as his *own* due; and hence God alone had a claim-right violated by the nonperformance. If John breaks his vow to God, he might then properly repent in the words of David: "To Thee only have I sinned."

In our actual world, very few spouses conceive of their mutual obligations in this way; but their small children, at a certain stage in their moral upbringing, are likely to feel precisely this way toward *their* mutual obligations. If Billy kicks Bobby and is punished by Daddy, he may come to feel contrition for his naughtiness induced by his painful estrangement from the loved parent. He may then be happy to make amends and sincere apology to *Daddy*; but when Daddy insists that he apologize to his wronged brother, that is another story. A direct apology to Billy would be a tacit recognition of Billy's status as a right-holder against him, someone he can wrong as well as harm, and someone to whom he is directly accountable for his wrongs. This is a status Bobby will happily accord Daddy, but it would imply a respect for Billy that he does not presently feel, so he bitterly resents according it to him. On the "three-to-marry" model, the relations between each spouse and God would be like those between Bobby and Daddy; respect for the other spouse as an independent claimant would not even be necessary; and where present, of course, never sufficient.

The advocates of the "three-to-marry" model who conceive it either as a description of our actual institution of marriage or a recommendation of what marriage ought to be, may wish to escape this embarrassment by granting rights to spouses in capacities other than as promisees. They may wish to say, for example, that when John promises God that he will be faithful to Mary, a right is thus conferred not only on God

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as promisee but also on Mary herself as third-party beneficiary, just as when John contracts with an insurance company and names Mary as his intended beneficiary, she has a right to the accumulated funds after John's death, even though the insurance company made no promise to her. But this seems to be an unnecessarily cumbersome complication contributing nothing to our understanding of the marriage bond. The life insurance transaction is necessarily a three party relation, involving occupants of three distinct offices, no two of whom alone could do the whole job. The transaction, after all, is defined as the purchase by the customer (first office) from the vendor (second office) of protection for a beneficiary (third office) against the customer's untimely death. Marriage, on the other hand, in this our actual world, appears to be a binary relation between a husband and wife, and even though third parties such as children, neighbors, psychiatrists, and priests may sometimes be helpful and even causally necessary for the survival of the relation, they are not logically necessary to our conception of the relation, and indeed many married couples do quite well without them. Still I am not now purporting to describe our actual world, but rather trying to contrast it with a counterpart world of the imagination. In *that* world, it takes three to make almost any moral relation and all rights are owned by God or some sovereign under God.

There will, of course, be delegated authorities in the imaginary world, empowered to give commands to their underlings and to punish them for their disobedience. But the commands are all given in the name of the right-monopoly who in turn are the only persons to whom obligations are owed. Hence, even intermediate superiors do not have claim-rights against their subordinates but only legal powers to create obligations in the subordinates to the monopolistic right-holders, and also the legal privilege to impose penalties in the name of that monopoly.

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So much for the imaginary "world without rights." If some of the moral concepts and prac-

tices I have allowed into that world do not sit well with one another, no matter. Imagine Nowheresville with all of these practices if you can, or with any harmonious subset of them, if you prefer. The important thing is not what I've let into it, but what I have kept out. The remainder of this paper will be devoted to an analysis of what precisely a world is missing when it does not contain rights and why that absence is morally important.

The most conspicuous difference, I think, between the Nowheresvillians and ourselves has something to do with the activity of *claiming*. Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another though they may not hesitate to resort to force and trickery to get what they want. They have no notion of rights, so they do not have a notion of what is their due; hence they do not claim before they take. The conceptual linkage between personal rights and claiming has long been noticed by legal writers and is reflected in the standard usage in which "claim-rights" are distinguished from other mere liberties, immunities, and powers, also sometimes called "rights," with which they are easily confused. When a person has a legal claim-right to X, it must be the case (i) that he is at liberty in respect to X, i.e. that he has no duty to refrain from or relinquish X, and also (ii) that his liberty is the ground of other people's duties to grant him X or not to interfere with him in respect to X. Thus, in the sense of claim-rights, it is true by definition that rights logically entail other people's duties. The paradigmatic examples of such rights are the creditor's right to be paid a debt by his debtor, and the landowner's right not to be interfered with by anyone in the exclusive occupancy of his land. The creditor's right against his debtor, for example, and the debtor's duty to his creditor, are precisely the same relation seen from two different vantage points, as inextricably linked as the two sides of the same coin.

And yet, this is not quite an accurate account of the matter, for it fails to do justice to the way claim-rights are somehow prior to, or more basic than, the duties with which they are

necessarily correlated. If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip. It is only because something from Tuck is *due* Nip (directional element) that there is something Tuck *must do* (modal element). This is a relation, moreover, in which Tuck is bound and Nip is free. Nip not only has a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duty, and forget the whole thing. If the personal claim-right is also backed up by criminal sanctions, however, Tuck may yet have a duty of obedience to the law from which no one, not even Nip, may release him. He would even have such duties if he lived in Nowheresville; but duties subject to acts of claiming, duties derivative from the contingent upon the personal rights of others, are unknown and undreamed of in Nowheresville.

Many philosophical writers have simply identified rights with claims. The dictionaries tend to define "claims," in turn as "assertions of right," a dizzying piece of circularity that led one philosopher to complain—"We go in search of rights and are directed to claims, and then back again to rights in bureaucratic futility."⁵ What then is the relation between a claim and a right?

As we shall see, a right is a kind of claim, and a claim is "an assertion of right," so that a formal definition of either notion in terms of the other will not get us very far. Thus if a "formal definition" of the usual philosophical sort is what we are after, the game is over before it has begun, and we can say that the concept of a right is a "simple, undefinable, unanalysable primitive." Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised, I think, not to attempt definition of either "right" or "claim," but rather to use the idea of a claim in informal elucidation of the idea of a right. This is made possible by the fact that *claiming* is an elaborate sort of rule-governed activity. A claim is that which is claimed, the object of the act of claiming. . . . If we concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather

than on its upshot alone, we may learn more about the generic nature of rights than we could ever hope to learn from a formal definition, even if one were possible. Moreover, certain facts about rights more easily, if not solely, expressible in the language of claims and claiming are essential to a full understanding not only of what rights are, but also why they are so vitally important.

Let us begin then by distinguishing between: (i) making claim to . . . , (ii) claiming that . . . , and (iii) having a claim. One sort of thing we may be doing when we claim is to *make claim to something*. This is "to petition or seek by virtue of supposed right; to demand as due." Sometimes this is done by an acknowledged right-holder when he serves notice that he now wants turned over to him that which has already been acknowledged to be his, something borrowed, say, or improperly taken from him. This is often done by turning in a chit, a receipt, an I.O.U., a check, an insurance policy, or a deed, that is, a *title* to something currently in the possession of someone else. On other occasions, making claim is making application for titles or rights themselves, as when a mining prospector stakes a claim to mineral rights, or a householder to a tract of land in the public domain, or an inventor to his patent rights. In the one kind of case, to make claim is to exercise rights one already has by presenting title; in the other kind of case it is to apply for the title itself, by showing that one has satisfied the conditions specified by a rule for the ownership of title and therefore that one can demand it as one's due.

Generally speaking, only the person who has a title or who has qualified for it, or someone speaking in his name, can make claim to something as a matter of right. It is an important fact about rights (or claims), then, that they can be claimed only by those who have them. Anyone can claim, of course, *that* this umbrella is yours, but only you or your representative can actually claim the umbrella. If Smith owes Jones five dollars, only Jones can claim the five dollars as his own, though any bystander can *claim that* it belongs to Jones. One important difference then between *making legal claim to* and *claiming that* is that the former is a legal performance with direct legal consequences whereas the latter is

often a mere with no legal claim to can sense of "claiming" "the performance of claim (performance to which one to the very recognition) indeed!

Claiming to call "propositional formative claim can do with doing that consequences. To it in such a they be recognized many thing claimed, that tion can be a claim, for certain rights, certain rights; are true, or fulfillments, claim that to *claiming*. One can assert whether any point of people listen know something asserting it, knowledge that it be taken of it b truth is probable, in every is the case it than calm a (This kind c ably less cor claim in the has a right of "appropriate occasions w possession i knowledge

often a mere piece of descriptive commentary with no legal force. Legally speaking, *making claim* to can itself make things happen. This sense of "claiming," then, might well be called "the performative sense." The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e. not even for recognition) would be a very "imperfect" right indeed!

Claiming that one has a right (what we can call "propositional claiming" as opposed to "performative claiming") is another sort of thing one can do with language, but it is not the sort of doing that characteristically has legal consequences. To claim that one has rights is to make it in such a manner as to demand or insist that they be recognized. In this sense of "claim" many things in addition to rights can be claimed, that is, many other kinds of proposition can be asserted in the claiming way. I can claim, for example, that you, he, or she has certain rights, or that Julius Caesar once had certain rights; or I can claim that certain statements are true, or that I have certain skills, or accomplishments, or virtually anything at all. I can claim that the earth is flat. What is essential to *claiming that* is the manner of assertion. One can assert without even caring very much whether anyone is listening, but part of the point of propositional claiming is to *make sure* people listen. When I claim to others that I know something, for example, I am not merely asserting it, but rather "obtruding my putative knowledge upon their attention, demanding that it be recognized, that appropriate notice be taken of it by those concerned. . . ." ⁶ Not every truth is properly assertable, much less claimable, in every context. To claim that something is the case in circumstances that justify no more than calm assertion is to behave like a boor. (This kind of boorishness, I might add, is probably less common in Nowheresville.) But not to claim in the appropriate circumstances that one has a right is to be spiritless or foolish. A list of "appropriate circumstances" would include occasions when one is challenged, when one's possession is denied, or seems insufficiently acknowledged or appreciated; and of course even

in these circumstances, the claiming should be done only with an appropriate degree of vehemence.

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. They are especially sturdy objects to "stand upon," a most useful sort of moral furniture. Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims. Not all of this can be packed into a definition of "rights"; but these are *facts* about the possession of rights that argue well their supreme moral importance. More than anything else I am going to say, these facts explain what is wrong with Nowheresville. . . .

Endnotes

1. H. B. Acton, "Symposium of 'Rights,'" *Proceedings of the Aristotelian Society*, Supplementary Volume 24 (1950): 107-108.
2. J. L. Austin, "A Plea for Excuses," *Proceedings of the Aristotelian Society*, Vol. 57 (1956-57).
3. For a fuller discussion of the concept of personal desert see my "Justice and Personal Desert," in C. J. Chapman, ed. *Nomos VI, Justice* (New York: Atherton Press, 1963), pp. 69-97.
4. II Sam. 11. Cited with approval by Thomas Hobbes in *The Leviathan*, Part II, Chapter 21.
5. H. B. Acton, *op. cit.*
6. G. J. Warnock, "Claims to Knowledge," *Proceedings of the Aristotelian Society*, Supplementary Volume 36 (1962): 21.

